

YANG (Migration) [2018] AATA 4764 (12 October 2018)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Hanxu YANG
CASE NUMBER:	1721010
DIBP REFERENCE(S):	CLF2016/58490
MEMBER:	Russell Matheson
DATE:	12 October 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Child (Residence) (Class BT) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 802 (Child) visa: • Public Interest Criterion 4020 for the purposes of cl.802.223 of Schedule 2 to the Regulations. • • • Statement made on 12 October 2018 at 8:06am

CATCHWORDS

MIGRATION – Child (Residence) (Class BT) visa – Subclass 802 (Child) visa – bogus documentation – birth certificate inconsistencies – name change – DNA testing – sponsor biological father – compassionate and compelling reasons – father wholly reliant on sponsor for support – sponsor’s health issues – applicant cares for sponsor – decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2 cl 802.223 Schedule 4 PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Trivedi v MIBP [2014] FCAFC 42

Plaintiff M64/2015 v MIBP [2015] HCA 50

Singh v Minister for Immigration & Anor [2017] FCCA 2461

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 August 2017 to refuse to grant the applicant a Child (Residence) (Class BT) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 27 September 2016. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.802.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that the visa applicant had provided information that was false or misleading in material in respect of the visa application and did not meet Public Interest Criterion 4020. The applicant seeks review of the delegate's decision.
5. The applicant appeared before the Tribunal on 9 October 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

8. BACKGROUND

9. The applicant is a 21 year old Chinese national born to the first marriage of the sponsor (her father) to Ms Ying Qin. The applicant was born in a country village of Jilin Province at the local hospital Yanming Lane Clinic. The applicant arrived in Australia attached to the visa application as the step-child of the sponsor's second wife on a Subclass 309 visa in November 2014. The applicant completed her high school studies at Kogarah High School and is currently studying Project Management at the Australia Vocational Training Institute in Sydney.
10. The sponsor is a 46 year old male who migrated to Australia in 2006 on an independent skilled migrant (Subclass 136) visa. The sponsor became an Australian permanent resident in 2007 and was granted Australian citizenship in 2012. The sponsor divorced his first wife and met and married another Chinese national and sponsored her to come to Australia on a Subclass 309 visa with the applicant attached as her step-child in November 2014. The sponsor's second wife subsequently returned to China and the applicant remained in Australia with her father.

11. CONSIDERATION OF CLAIMS OF EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.802.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting three years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. There is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application.
18. On 13 March 2017, the applicant provided evidence to the Department that was considered of a 'non-genuine' nature.
19. On 6 June 2017 the Department wrote to the applicant and advised her that her birth certificate had been referred to the overseas office in China to be verified. The overseas office contacted the clinic responsible for issuing the birth certificate and inconsistencies in her birth certificate were identified, raising concerns that the birth certificate is not genuine. This also raised concerns as to whether her sponsor was the biological father as identified on the birth certificate.

20. The applicant in her application completed a Form 47CH – Application for migration by a child; at question 3 she advised her given name is Hanxu and family name is Yang. The question which asks if the applicant has ever been known by any other name was left blank. Question 4 in the Form 80-personal particulars for assessment including character assessment which asked a similar question was answered no by the applicant.
21. The applicant provided a notarial certificate of birth with her application to confirm her relationship to the sponsor (father).
22. When the Department requested a copy of the applicant's birth certificate the sponsor using the applicant's nominated email address, advised the Department that the applicant's birth certificate had been lost and the hospital where the applicant had been born had closed down. The sponsor advised that the applicant had been born at the Yanming Lane Clinic and it had merged to the Yanming Town Hospital of Dunhua City, Jun Provence.
23. The applicant provided a copy of her birth certificate to the Department on 13 March 2017. The certificate was referred to the overseas office in China to be verified. The office advised that the clinic formally changed its name to Yanming Lane Town Clinic from Dashan Zuizui Town Clinic on 19 November 2013. The birth certificate was purportedly issued on 18 June 1997 with the current name of the clinic on it; the birth certificate is not genuine.
24. On 6 April 2017 the applicant was offered the opportunity to undertake DNA testing to confirm her relationship with the sponsor. On 13 April 2017 the Department received the DNA test results confirming the sponsor is the applicant's biological father.
25. Based on the information provided, the father listed on the applicant's birth certificate (and his identification number) is correct, the hospital the applicant was born in and the name on the birth certificate are incorrect.
26. The sponsor told the Tribunal and provided a statutory declaration to the effect that he arrived in Australia as an independent skilled migrant on a (Subclass 136) visa. The sponsor further states that he disclosed on his visa application that he was divorced and there was one child to the relationship named Fan Yang. He further states that Fan Yang was his daughters name at birth. He further states that following his divorce from his former wife who had custody of the child, his daughters name was changed when she was six to seven years of age to her current name of Hanxu Yang.
27. The applicant and sponsor in oral evidence and their statutory declarations have said that they relied upon a relative (the applicant's auntie) to provide a copy of the applicant's birth certificate to the Department with the visa application. Both the applicant and the sponsor stated that they were unaware that the auntie had provided a bogus document with false information in relation to the applicant's birth certificate. The applicant and sponsor acknowledge that the document provided by the auntie is a bogus document providing false information and do not contest this view. The sponsor stated that he provided all the documents including the birth certificate to the Department because the applicant was studying for her HSC at the time.
28. The sponsor claims that when he scrutinised the document provided by the applicant's auntie he did not notice anything peculiar about it. He further stated that he noticed that it was in the name of Hansu Yang and that it did not occur to him that it should have been Fan Yang, the name his daughter was known by at birth. He further stated that the aunt was unable to obtain a copy of the original birth certificate and asked someone to forge the birth certificate.

29. The Tribunal gives little weight to the sponsor's evidence that he was unaware the birth certificate was fake on the basis that the certificate claims to be issued at birth using a name that the applicant was not known by until seven years after birth. The sponsor also provided evidence that when he arrived in Australia in 2006 as an independent skilled migrant on a (Subclass 136) visa he had disclosed his daughter's original name Fan Yang on his visa application. The Tribunal gives little weight to the claim the aunt arranged the birth certificate without any consultation with the sponsor.
30. The Tribunal accepts that the applicant may have been unaware at the time of application due to her study commitments that a bogus document had been provided with the visa application. The Tribunal also accepts that the birth certificate was provided by the applicant's father on behalf of the applicant using the email address the applicant authorised the Department to use for all contact with her regarding the visa application. As the birth certificate was provided by the authorised email address, the birth certificate is taken to have been provided by the applicant.
31. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

32. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
33. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
34. The applicant's agent submits that the application of the word "compassionate" as used in PIC 4020 (4) was considered in the matter of *Singh v Minister for Immigration & Anor* [2017] FCCA 2461 by His Honour Judge Manousaridis at page 284 of the judgement. At paragraph 34, His Honour remarked: "(the ordinary) meaning of the noun 'compassion' is the 'feeling or emotion, when a person is moved by the suffering or distress of another, and by the desire to relieve it; pity that inclines one to spare or to succour'. The word "compassionate", therefore, implies the existence of a person or persons suffering or being distressed. For the circumstances that affect the interest of the relevant person to be characterised as "compassionate" within the meaning of PIC 4020 (4)(b), therefore, the circumstance's must be those that:-
- a. Will be brought about by the visa applicant not being granted a visa;
 - b. Will result in the relevant person suffering or being distressed; and
 - c. Will induce desire by the decision-maker to alleviate the suffering and distress that will be brought about by the visa applicant not being granted the visa in question.
35. The sponsor stated that the applicant is living at home with him and she is a full time student who is wholly dependent upon him for financial support and her basic needs for food, clothing and shelter. The Tribunal accepts the applicant is wholly reliant on the sponsor,

which is greater than any reliance on any other person or source of support. He further stated that the applicant has been living with him for the past four years and has no family she can return to live with in China, and he has concerns for her welfare if she had to return to China without any qualifications or capacity to work or any accommodation. He further states she is a young person inexperienced in life and will be unsupported and without immediate family members in China. The sponsor also stated that the applicant's mother is now living in South Korea and has re-married and has no capacity to care for and support her daughter.

36. The sponsor states that he has and continues to suffer significant detriment to his health as a consequence of the failure of his daughter's visa application and is of the belief this ill health will grow worse over the years if he is deprived of the companionship and love of his daughter. The sponsor provided as evidence a copy of his mental health care plan and assessment. The sponsor told the Tribunal that he is taking medication for depression, high blood pressure and insomnia. He further stated that he is suffering physically and psychologically and this is having an impact on his ability to work, and placing him under financial pressure. The sponsor also said that he has little social interaction with other people and has lost interest in life and he blames himself for his daughter's visa refusal. The Tribunal accepts that the sponsor would suffer a significant amount of emotional stress and trauma if separated from his daughter and this would have a significant impact upon his health. The applicant stated that she has concerns for her father's welfare if they were to be separated. She further stated that she maintains the household and provides care and support for her father and assists him with his medication.
37. On 6 April 2017 the applicant was offered the opportunity to undertake DNA testing to confirm her relationship with the sponsor. On 13 April 2017 the Department received the DNA test results confirming the sponsor is the applicant's biological father. The Tribunal accepts that the applicant is the daughter of the sponsor.
38. The applicant's agent submitted that the sponsor, like any other parent is more concerned about his daughter than himself. He further submits that if the parties were separated it would have a significant impact on the sponsor's health. The applicant also submitted that the best thing for the child is to be with her parent and this would be of significant benefit to the sponsor in regards to health and also be of significant benefit to the applicant because he is the only family member with the capacity to support and care for her.
39. The Tribunal found the applicant and sponsor to be genuine and persuasive in regard to their evidence and overall found them credible. Given the nature of the sponsor's health and the applicant's role in contributing to the sponsor's welfare, the impact that the applicant's departure would have upon the sponsor's family life in the terms of the loss of companionship and the emotional, physical and psychological impact upon the sponsor, combined with his reduced capacity to work in an efficient manner, the sponsor's medical condition would be further exacerbated if the applicant were forced to relocate overseas to live unsupported. The Tribunal has formed the view that such circumstances give rise to compassionate and compelling circumstances that affect the interests of an Australian citizen, the sponsor. For that reason, if the visa applicant was not to meet PIC 4020(1), the Tribunal would find that the requirements should be waived.
40. Therefore the Tribunal is satisfied that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify granting of the visa so that the requirements of PIC 4020(1) should be waived.

Has the applicant satisfied the identity requirements?

41. Clause 4020(2A) requires an applicant to satisfy the Tribunal as to his or her identity. The visa applicant's identity documents have been provided with the application. The applicant supplied a certified copy of her Chinese passport. The Tribunal is satisfied the applicant has proven her identity.
42. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
43. There is no evidence that the applicant or any other member of her family unit had been refused a visa because of a failure to satisfy the identity requirement. Therefore, cl.4020(2B) does not apply.
44. Therefore, the applicant meets cl.4020(2A) and PIC 4020(2B).
45. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.802.223.

46. DECISION

47. The Tribunal remits the application for a Child (Residence) (Class BT) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 802 (Child) visa:
 - Public Interest Criterion 4020 for the purposes of cl.802.223 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and

- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...